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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

JAMES D. HODGSON, SECRETARY OF LABOR, PETITIONER

v.

ARNHEIM AND NEELY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App A, *infra*) is reported at 444 F. 2d 609. The opinion of the district court (App. D, *infra*) is reported at 324 F. Supp. 897.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1971 (App. C, *infra*). A timely petition for rehearing *en banc* was denied on February 9, 1972 (App. B, *infra*). On May 10, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ

of certiorari to June 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in determining whether the gross dollar volume of business done by a real estate management firm managing several office and apartment buildings for different owners is sufficient to bring janitorial and maintenance employees at those buildings within the protection of the Fair Labor Standards Act, all the buildings managed by the firm should be considered part of a single "enterprise," within the meaning of Section 3(r) of the Act, 29 U.S.C. 203(r).

STATUTES INVOLVED

Section 3(r) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203(r)), reads as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor * * *.

Section 3(s)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 203(s)(1)), reads as follows:

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated) * * *.

STATEMENT

This suit was brought by the Secretary of Labor to enjoin Arnheim and Neely, Inc. (hereinafter "respondent") from violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*, and from continuing to withhold wages due to its building maintenance employees. Respondent admitted that it did not pay the wages or keep the records required by the Act, but claimed that it was not an "employer" of the maintenance workers

and, further, that it was not subject to the Act's requirements since it did not meet the "enterprise" coverage test of Section 3(s)(1) (*supra*, p. 3).

Respondent is a real estate firm that manages eight office buildings and one apartment complex in the greater Pittsburgh area, each of which has a different owner. These management activities are carried out under contracts with the building owners delegating to respondent all the functions required for leasing, operating, and maintaining the buildings, including the following: obtaining tenants; negotiating, executing, and enforcing leases; collecting rents; arranging for the provision of utilities and other services; purchasing supplies; cleaning, repairing, decorating, and altering the premises; and paying all expenses of operation (A. 17-20, 24, 39-41).[1]

Respondent conducts these building management activities from a central office, under the direction of several "staff managers" who are each assigned "managerial responsibility for one or more of the [nine] buildings" (A. 20-21, 26-27), and who are assisted by clerical and staff personnel. In addition to these employees, respondent hires, discharges and supervises all the labor required to operate and maintain the managed buildings, including superintendents, assistant superintendents, cleaning ladies, custodial workers, watchmen, elevator operators, and engineers (A. 25, 29-36, 45-48; Stip. Exh. 8). Respondent assigns the duties, fixes the hours of work and determines the rates of pay of the maintenance employees, although

[1] "A." refers to the Appendix filed in the court of appeals.

these matters may be subject to the particular owner's approval (A. 25–26). Respondent handles negotiations with any union representing or seeking to represent the maintenance workers (A. 26).

The rents collected from the managed buildings, which total more than $1.9 million per year, are deposited into separate bank accounts maintained for each owner. Each account is used by respondent to pay all expenses incurred in operating the building, including the wages of the maintenance workers. After respondent has paid expenses and deducted its commissions, it remits the balance to the building owner (A. 19–22, 39).

The district court held that the janitorial and maintenance personnel employed at the buildings managed by respondent were entitled to the protection of the Act after February 1, 1967, the effective date of certain amendments to Section 3(s) adopted by Congress in 1966.[1] In so finding, the court held that respondent was an "employer" within the meaning of the Act (App. D, *infra*, pp. 31–37) and that its building maintenance activities were "related" and performed under "common control" for "a common business purpose," so as to constitute a single "enterprise" within the meaning of Section 3(r) (App. D, *infra*, pp. 39–42).

[1] Prior to the 1966 amendments, the statute contained a considerably narrower definition of engagement in commerce. The district court concluded that the employees involved here were not engaged in commerce, and therefore not subject to the Act, prior to the effective date of those amendments. The court of appeals did not reach this issue, and we do not seek review of it here.

It also held that the size of this enterprise (*i.e.*, its annual gross volume of sales made or business done) should be measured by the gross rents received from the buildings it managed and not, as respondent had contended, by respondent's commissions (App. D, *infra*, pp. 37–39).

The court of appeals sustained the district court's rulings holding respondent to be an "employer" (App. A, *infra* pp. 16–18) and concluding that the gross volume of sales made or business done should be measured by rents rather than commissions (App. A, *infra*, pp. 18–19), but reversed the decision on the ground that each building constitutes a separate and distinct "enterprise" under Section 3(r) (App. A, *infra*, pp. 19–24).

In reaching this result, the court of appeals concluded that Section 3(s) embodies a legislative policy to avoid undesirable economic consequences to small or inefficient businesses by exempting them from minimum wage requirements. Because respondent maintains a separate bank account for each owner and because application of the Act to the maintenance workers would impose an economic burden on the owners, the court held the "enterprise" definition inapplicable to respondent's operations with respect to the maintenance workers, and looked instead to the building owners. Since the evidence showed no "common business purpose" on the part of the owners, the court found no requirement "that the gross rentals of each of the Company's [respondent's] principals be pooled together merely because each principal has employed

the Company as an agent" (App. A, *infra*, p. 21). Since each building was, therefore, to be considered a separate "enterprise," the court remanded the case to the district court for findings on whether any of the buildings generated enough rent individually to come within the coverage of the Act.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the decision of the Fourth Circuit in *Shultz* v. *Falk*, 439 F. 2d 340, certiorari denied *sub nom. Falk v. Hodgson*, 404 U.S. 837, as was recognized by the court below in its opinion (App. A, *infra*, p. 21).[1] This conflict involves an issue that affects hundreds of businesses and thousands of employees around the country and that will undoubtedly generate litigation in every court of appeals in the Nation unless resolved by this Court. Review by this Court is thus essential to the orderly administration and uniform enforcement of the Act in an area where Congress sought to eliminate fragmentation of coverage and thereby extend the Act's protection to numerous workers who, for the most part, are in need of that protection.

1. This case and *Shultz* v. *Falk*, *supra*, are identical except for the immaterial fact that respondent's management activities are performed in connection with office buildings and an apartment complex, while

[1] The government did not oppose the granting of certiorari in *Falk* on the question presented in the present petition if the conflict between the Third and Fourth Circuits was not eliminated by the government's then-pending petition for rehearing in the present case (see *Falk* v. *Hodgson*, No. 70-225, Memorandum for the Respondent, p. 16).

those in *Falk* were performed in connection with apartment buildings only. Moreover, the precise contention accepted by the court below as the basis for its decision—viz., that respondent's building management activities could not be treated as part of a single enterprise unless the interests of the building owners were also related—was rejected by the Fourth Circuit in *Falk*, in these terms (439 F. 2d at 346):

> It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects. All that the enterprise requirement entails is that the defendants maintain under "common control" or as a "unified operation" a set of "related activities" having a "common business purpose," and that their employees be employed as a part of this operation. The organization and operation of defendants' apartment management business satisfy these requirements. Defendants supervise the employees involved here through a hierarchy terminating in their central offices. The services provided are substantially similar from project to project, and have the common purpose of maintaining and operating apartment buildings. The building workers are employed in this enterprise, since they are under defendants' control and carry out its purposes. The fact that they are employed at separate buildings does not prevent their being part of the same enterprise for purposes of the Act [emphasis in original]. * * *

2. While we are unable to supply a precise estimate of the number of businesses and employees who are

affected by this issue, it is clear that, considering real estate management companies alone, the number is substantial. For example, the motion of The Institute of Real Estate Management to intervene as a party defendant in this case, which was filed in the district court, represents that the Institute has 1650 members who manage a total of 7500 buildings (Motion to Intervene as a Defendant under Rule 24, p. 2). It may safely be assumed that the correct defintion of "enterprise" is relevant to the application of the Act to many, if not most, of the Institute's members, and further that they employ tens of thousands of relatively unskilled and low-paid maintenance and janitorial workers.

Moreover, petitioner has brought enforcement actions against real estate management firms in fifteen other cases now pending in district courts in six circuits. The resolution of each of these cases depends in important part on the correct application of the "enterprise" definition. In addition, the Wage and Hour Division of the Department of Labor has 350 pending investigations of real estate management firms and completed 250 such investigations in the month of April 1972. The "enterprise" issue is relevant to a substantial proportion of these investigations.

The need for resolution of this issue will be further increased in the event of enactment by Congress of amendments to the Act recently passed by the House of Representatives, or of similar legislation. H.R. 13, passed by the House on May 11, 1972, provides a different minimum wage for enterprises with an an-

nual gross volume of business above $1,000,000 from that which would be applicable to enterprises with a gross of between $250,000 and $1,000,000. The determination of the minimum wage applicable to building maintenance workers will thus depend on the size of the "enterprise" by which they are employed.

3. The court below misconstrued Section 3(r). That Section defines "enterprise" as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." There is no requirement that these activities be conducted in establishments owned by the person or persons performing the activities or that the establishments where the activities are performed be related. It is necessary only that the *activities* be "related" and that *they* be performed "either through unified operation or common control for a common business purpose." As shown by the quoted excerpt from the Fourth Circuit's opinion in *Falk* (p. 8 *supra*), these statutory requirements are clearly met by respondent's operations.

The contrary view of the court below is apparently based on its belief that since respondent maintains "*separate bank accounts for each owner*," it would be unfair, in determining the scope of respondent's enterprise, to pool the rents from the several buildings "merely because each principal has employed the Company as an agent" (App. A, *infra*, pp. 20–21; emphasis in original). But the Act's enterprise provisions are concerned not with a company's "profit" (or loss) or "net income" (or its "presumed economic capacity to

pay" (App. A, *infra*, p. 20)), but, rather, with the size of its activities and the impact of those activities on commerce. S. Rep. No. 1487, 89th Cong., 2d Sess., pp. 7–8; see also *Shultz* v. *Falk*, *supra*, 439 F. 2d at 347; *Wirtz* v. *Allen Green & Associates, Inc.*, 379 F. 2d 198, 199–200 (C.A. 6). The fact that respondent maintains separate bank accounts for each building owner does not reduce the magnitude of respondent's building management activities, nor does it diminish their impact on commerce.

This action was not brought against the building owners, and it is not here contended that they are in violation of the Act. Moreover, the court of appeals' solicitude for the plight of the building owners is misplaced, since it overlooks the fact that the owners are the beneficiaries of respondent's ability to make bulk purchases of supplies, to offer the services of experienced management personnel who also manage other buildings, to provide efficient centralized billing and collection services, and otherwise to operate the buildings more efficiently and at lower cost than would be possible if each building were managed separately.[4]

In short, the court of appeals has unwarrantably imposed a narrow construction of the Act's coverage, ex-

[4] The excerpt from the legislative history relied upon by the court of appeals (App. A, *infra*, p. 22) is addressed, not to the situation presented by respondent's operations, but to those coming within the ambit of the proviso to Section 3(r), such as individual tenants in a shopping center or independently owned franchisees. In none of those situations does the non-covered business (equivalent to the building owners) employ the umbrella organization (*e.g.*, shopping center or franchisor) as its agent for the purpose of operating its business and hiring, assigning, and paying employees.

cluding thousands of workers who are commonly required to put in long hours at low pay. This is contrary to this Court's established policy favoring liberal construction of the Act so as to apply it "to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1972.

APPENDIX A

United States Court of Appeals for the Third Circuit

Nos. 18,772, 18,773, 18,774

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT IN No. 18,772

v.

ARNHEIM AND NEELY, INC., A CORPORATION, APPELLANT IN No. 18,773 AND THE INSTITUTE OF REAL ESTATE MANAGEMENT OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, INTERVENOR, APPELLANT IN No. 18,774

(D.C. Civil Action No. 67-1202)

Appeal From the United States District Court For the Western District of Pennsylvania

Argued March 17, 1971

Before ADAMS and GIBBONS, *Circuit Judges*, and WHIPPLE,* *District Judge*.

OPINION OF THE COURT

Filed June 15, 1971

ADAMS, *Circuit Judge*. In this case we are asked to decide whether a real estate management company

*Of the New Jersey District Court sitting by designation.

which operates and maintains, but does not own, certain commercial buildings is an employer whose activities are regulated by the Fair Labor Standards Act as amended.

The Secretary of Labor sought an injunction in the District Court for the Western District of Pennsylvania under § 17 of the Fair Labor Standards Act, 29 U.S.C.A. § 201, *et seq.*, to enjoin Arnheim and Neely, Inc. (Company) for violating the minimum wage, overtime, and record keeping provisions of the Act, and to require the Company to pay back wages owed to the employees.

The District Court decided that from January, 1964 until February, 1967 the Company had not been subject to the Act's requirements, but thereafter, as a result of the 1966 amendments to the Act, the Company came within the enlarged scope of the Act, because the 1966 amendments reduced the economic criteria for coverage. Accordingly, the District Court granted the relief sought by the Secretary of Labor for the years following 1967 only. The Government appealed, and the Company filed a cross appeal.

The facts have been stipulated. The Company manages eight office buildings and one apartment complex located in the greater Pittsburgh area. The Company does not own these buildings except for a minor interest in one of them, but operates them under a management contract. Pursuant to the contract, the Company obtains tenants, negotiates and signs leases, institutes legal actions regarding these leases when necessary, alters and redecorates the buildings according to its own judgment, obtains utility contracts, and pays taxes and other bills relating to the properties. The Company collects the rent receipts for each building and deposits them in a separate bank account established for each building. The funds de-

posited in these accounts are the property of each building's owner, and expenses for each building are paid from the bank account established for that building. Any loss suffered in regard to a particular building is the loss of the owner of such building and not of the Company. Likewise, the profits belong to the respective owners of the buildings and not to the Company. Periodically, the Company withdraws the balance of funds having accrued in each account and forwards them to the respective owners.

The Company hires, discharges and supervises all employees necessary for the operation and maintenance of the buildings. Such employees include building superintendents and their assistants, cleaning ladies, custodians, watchmen, and elevator operators. Subject to the approval of the building's owner, the Company assigns each worker to his particular duties, fixes hours of work, and negotiates rates of pay and fringe benefits. In each building at least two employees operate elevators which carry postmen and messengers who deliver mail and packages to the building's tenants; a portion of such mail and packages originate from points outside of Pennsylvania. In one of the buildings, the Buhl Building, two employees personally deliver to tenants parcels, some of which originate outside of Pennsylvania. At another building, 319 Fifth Avenue, the elevator operators transport freight from the tenants, a portion to be delivered to points outside of Pennsylvania.

"Staff managers" employed by the Company maintain records relating to these buildings and submit periodic reports to the owners of each building. Some of the owners are located in states other than Pennsylvania. In 1964, the aggregate gross receipts from the nine buildings was approximately two million dollars, and from 1956 until the present the gross re-

ceipts have exceeded one million dollars per year.[1] The Company's commission has varied from year to year, but at no time has exceeded five hundred thousand dollars in any one year.

The Fair Labor Standards Act requires employers covered by the Act to pay their employees a fixed minimum wage,[2] forbids employers to require their employees to work more than a forty hour week unless they receive one and one half times their regular wages for such work, and mandates that records of wages and hours be maintained by the employers.

In reaching its ultimate conclusions regarding the scope of the Act's coverage before and after the 1966 amendments, the District Court made several subsidiary legal determinations. Each has been attacked, either by the Secretary or the Company.

I

The District Court decided that the Company, notwithstanding the fact that it was acting as an *agent*

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[1] The gross receipts of each building during 1964 are stipulated:

Buhl Building	$93,537.69
Clark Building	800,902.10
Eureka Savings Building	71,873.94
Keenan Building	176,653.72
Marlin Building	117,948.45
Pittsburgh Terminal Properties	265,225.57
University Square No. 1	277,848.00
Pittsburgh Life Building	54,307.00
Building 319 Fifth Avenue	57,190.00
	1,935,485.72

[2] The basic minimum wage set by the Act has been increased by Congress several times during the periods relevant to this case:

From 1/4/64 until 1/31/67	$1.25
From 2/1/67 until 1/31/68	1.40
From 2/1/68 until the present	1.60

in hiring employees to maintain the buildings, was an "employer" as defined by the Act. In so deciding the District Court rejected the Company's contention that the term "employer" was to be given its common law or its traditional meaning. Instead, the Court applied the standard contained within the Act itself. The Act provides "that the term 'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . ." 29 U.S.C.A. § 203(d). On its face the statute adopts a definition of the term "employer" broader than that of the common law, and applicable under the present facts to the Company. Thus, in Greenberg v. Arsenal Bldg. Corp., 50 F. Supp. 700 (S.D.N.Y. 1943), aff'd 144 F.2d 292 (2nd Cir. 1944), rev'd on other grounds sub nom. Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945), it was held that a real estate management company is an employer for purposes of the Act despite the agency relationship of the management company to owners of the managed buildings.

The fact that the owners of the buildings may also be considered "employers" as a result of their ultimate right to review policies and hiring practices followed by the Company does not preclude a finding that the Company is also an "employer." The Act contemplates the possibility of several simultaneous "employers" any one of which may be liable as an employer under the Act. Wirtz v. Herbert, 368 F.2d 199 (5th Cir. 1966); Mid-Continent Pipe Line Co. v. Hargrave, 129 F.2d 655 (10th Cir. 1942).

The Company argues that Bartels v. Birmingham, 332 U.S. 126 (1947), provides the applicable test—one of economic reality—to determine whether it is an "employer." As support for this contention, the Company stresses certain language of the *Bartels* opinion: "Obviously control is characteristically as-

sociated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. at 130. The District Court read this language in conjunction with United States v. Silk, 331 U.S. 704 (1947), decided a week before *Rutherford*, which held that in social legislation the term "employer" was not to be given a restrictive common law construction. 331 U.S. at 713. Thus the Courts are required to avoid technical concepts of the employment relationship and are admonished to examine the economic realities presented by the facts of each case. Goldberg v. Whitaker House Coop., 366 U.S. 28, 33 (1961). Applying the "economic reality" test to the present facts, there can be no doubt of the appropriateness of treating the Company as an employer. The Company's business is that of maintaining and managing real property for the individual owners of such property. Such activity provides economic benefit to the Company's clients as well as to the Company itself. Unsatisfactory work will harm both the Company and the building owners. Since the Company hires these employees and provides the conditions of their employment, it appears that the Company is "acting directly or indirectly in the interest of an employer in relation to an employee." The District Court correctly decided that the Company was an "employer" of the various persons working at the buildings, as such term is defined by the Act.

II

A second test imposed by the Act concerns the "amount of gross volume of sales of [the] enterprise," 29 U.S.C.A. § 203(s)(3) before the 1966 Amendments; 29 U.S.C.A. § 203(s)(1) after the 1966

Amendments. The District Court, over the objections of the Company, decided that the economic test contained in the Act applied to the gross rental receipts of the buildings and not to the gross commissions earned by the Company. We agree with the District Court. The statute clearly refers to the gross sales of an "enterprise,"[1] which term is defined as "related activities performed . . . by any person or persons for a comon business purpose. . . ." § 203(s). Thus, in Wirtz v. Jernigan, 406 F.2d 155 (5th Cir. 1968), it was squarely held that in deciding whether the seller of bus tickets came within the Act's coverage, the gross dollar volume of ticket sales, *not* the seller's commission, was the appropriate indicia of coverage. Since rentals are sales within the meaning of the Act, Wirtz v. First National Bank and Trust Company, 365 F.2d 841 (10th Cir. 1966), it logically follows that the gross rentals of buildings managed by the Company, and not merely the Company's commissions are to be considered in applying the Act.

III

Although the Company is an "employer" within the meaning of the Act, and the gross rentals rather than the gross commissions govern, we think the District Court erred when it aggregated the rental income of all nine buildings in applying one of the Act's criteria for coverage, the economic test. In addition to the "employer" requirement of the Act, before the 1966 amendments section 203(s)(3) set forth an economic test which limits the Act's coverage to certain businesses enjoying an annual gross

[1] Before the 1966 Amendments the Act referred to gross sales of any "establishment" of an "enterprise." Thus, prior to the effective dates of the 1966 amendments, it is clear that the gross rentals of each building would have to be considered separately in applying the Act's economic test.

volume of sales over one million dollars. The 1966 amendments expanded the Act's coverage by lowering the economic requirement to $500,000 during the period February 1, 1967 through January 31, 1969, and thereafter to $250,000. The legislative history of the Act makes it abundantly clear that the purpose of providing coverage to those companies with a minimum amount of gross sales was to avoid economic dislocation. The Senate Report accompanying the 1961 Amendments to the Act specifies:

> "The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under the law." (emphasies added) 1961 U.S. Code Cong. & Admin. News 1620, 1624.

Since the economic criteria of the Act is based upon a legislative judgment that only businesses which have attained a substantial gross volume of sales should be covered because of their presumed economic capacity to pay a prescribed minimum wage, apparently Congress feared that there might be undesirable economic consequences to small or inefficient businesses if they were brought within the scope of the Act.

The Company here did not benefit, except as to its commission, as a result of the aggregate gross volume of rentals accruing from all nine buildings. Instead it acted solely in an agency capacity on behalf of each of nine separate and distinct businesses. The facts stipulated in this regard are that the rentals collected by the Company are deposited in *separate bank ac-*

funds for each owner, and such funds are the property of the respective owners of the buildings. Any economic loss suffered in connection with a particular building is that of the owner. Similarly any profit enjoyed belongs to the individual building's owner. While as an agent the Company is liable as an "employer" to adhere to the strictures of the Act, nevertheless such vicarious responsibility does not require that the gross rentals of each of the Company's principals be pooled together merely because each principal has employed the Company as an agent.

The District Court reasoned that since the Company was in the 'business' of managing the buildings' janitorial services, . . . each building becomes one of [the Company's] 'places of business.'" The analysis employed by the court below has been directly adopted by the Fourth Circuit in Shultz v. Falk, No. 14,572 (filed March 3, 1971). However, the Act requires that before separate establishments be deemed part of an enterprise, they first must be found to be "related activities performed . . . for a common business purpose. . . ." The owner of each of these buildings is not engaged in a business purpose common to all the other eight building owners merely because each employed a common agent. The record is devoid of any other evidence tending to demonstrate that the nine individual building owners have a "common business purpose."[4] Were the buildings managed by their owners, the Government would not attempt to link them together as an enterprise bound together by a "common business purpose." The building owners' em-

[4] In Mitchell v. Hertzke, 284 F.2d 183 (10th Cir. 1956), the court held that the Secretary of Labor has the burden of proof on this type of issue in this case.

ployment of the Company as rental agent does not alter this critical fact.

The legislative intent to exclude for purposes of the Act separate businesses which use common service organizations was made manifest in the Senate Report to the Fair Labor Standards Amendments of 1961, which adopted the "enterprise" concept (1961 U.S. Code Cong. & Admin. News 1620, 1660-1661):

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments. For example, a retail establishment will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator."

If the record in this case revealed that the retention of the Company were accompanied by a change in the independent business purposes of the owners—for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners

share no common purpose except the decision to hire the Company as their rental or management agent. As pointed out in Wirtz v. Hardin & Co., 258 F.S. 975 (N.D. Ala. 1964), aff'd 350 F.2d (5th Cir. 1965), the utilization of a common service does not by itself establish a common business purpose shared by the owners of separate businesses. Without more than here presented, we think the "enterprise" requirement of the Act has not been satisfied. It would be anomalous to treat the owners of commercial buildings as proprietors of individual businesses when they manage the buildings themselves and as participating in a "common business purpose" with other building owners merely because they hire a rental agent who manages other buildings.[1] This is particularly so in view of the expressed intent of Congress not to burden small businesses with a minimum wage they may not be able to afford. Therefore, we think the proper approach under the facts of this case is to consider each of the nine buildings separately.

We do not reach additional questions posed on this appeal regarding whether the Company is engaged in interstate commerce as required by the Act, because viewing the gross rentals of each building separately it appears that in 1964 none of the buildings produced sufficient gross rentals to satisfy the Act's economic test. Since the stipulations of fact do not indi-

[1] It might also be considered anomalous that service employees hired by the management company might be paid different wages depending on the gross rentals of the particular building to which they were assigned. However, in view of the "common business purpose" requirement of the Act, we think the scale tips toward preventing inconsistent treatment of building owners who employ management companies as opposed to owners who manage their own buildings.

cate the gross rentals of each building after 1964, we are unable to determine whether any one of the buildings alone satisfies the reduced criteria provided by the 1966 Amendments for coverage under the Act.

Accordingly, the order of the District Court will be reversed and the case remanded so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 18,772/3/4

JAMES D. HODGSON, SECRETARY OF LABOR, ETC.
APPELLANT IN *No. 18,772*

v.

ARNHEIM AND NEELY, INC., ETC.
APPELLANT IN *No. 18,773*

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT, ETC.
APPELLANT IN *No. 18,774*

SUR PETITION FOR REHEARING

Present: Chief Judge SEITZ, Judge VAN DUSEN, Judge ALDISERT, Judge ADAMS, Judge GIBBONS, Judge ROSENN, *Circuit Judges*, and Judge WHIPPLE, *District Judge*.

The petition for rehearing filed by

JAMES D. HODGSON

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

ARLEN M. ADAMS, *Judge*.

Dated: February 9, 1972

APPENDIX C

In the United States Court of Appeals for the Third Circuit

Nos. 18,772 THROUGH 18,774

JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT IN No. 18,772

v.

ARNHEIM AND NEELY, INC., A CORPORATION, APPELLANT IN No. 18,773

and

THE INSTITUTE OF REAL ESTATE MANAGEMENT OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS, INTERVENOR, APPELLANT IN No. 18,774

(D.C. Civil Action No. 67-1202)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and GIBBONS, *Circuit Judges* and WHIPPLE*, *District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On considertaion whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 17, 1969, be, and the same is hereby reversed, and the cause remanded

so that the Government may have the opportunity to introduce evidence regarding each buildings' gross rentals during the relevant years, in accordance with the opinion of this Court. Costs taxed in favor of appellants in all cases.

Attest:

THOMAS R. QUINN, *Clerk.*

JUNE 15, 1971.

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*Of the District Court for the District of New Jersey, sitting by designation.

Costs taxed in favor of appellants in Nos. 18773/4 as follows:

Clerk's fees	$50.00
Brief for Arnheim & Neely and Inst. of Real Estate Mgmt	334.16
Total	384.16

APPENDIX D

OPINION

[Caption Omitted]

MILLER, D.J.

By his Complaint, plaintiff, Secretary of Labor of the United States Department of Labor, seeks injunctive relief to enjoin alleged violations of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 251(a)(2), 215(a)(5).

Defendant, Arnheim and Neely, Inc., is a Pennsylvania corporation engaging in real estate management, brokerage sales, real estate appraisals, insurance sales, and miscellaneous other real estate management activities. It answered the Complaint denying salient allegations thereof.

On January 17, 1968, the Institute of Real Estate Management of the National Association of Real Estate Boards filed a motion to intervene as a defendant under Rule 24 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 24. On January 18, 1969, "[b]y agreement of the parties," the Court granted the Motion" . . . with the understanding that litigation will not be extended beyond the facts relating to the business operations of defendant Arnheim and Neely, Inc. during the relevant period." Intervener answered the Complaint on January 17, 1968, denying salient allegations thereof.

On December 19, 1968, the parties filed a lengthy Stipulation [hereinafter abbreviated "Stip."].[1] On

[1] Although the Stipulation was filed prior to the Order granting leave to intervene, the Stipulation was executed by counsel for intervener.

March 20, 1969, plaintiff moved for summary judgment ". . . on the ground that the stipulaton of the parties filed herein and the pleadings show that no genuine issue of material fact exists . . . and that the plaintiff is entitled to judgment as a matter of law." On April 2, 1969, defendant and intervener moved for summary judgment asserting lack of a contested factual issue and demanding judgment as a matter of law.[3]

According to the Stipulation, defendant, since January 1, 1963, has managed nine buildings in the Greater Pittsburgh area.[4] [Stip. ¶ 204] Defendant owns none of these buildings. [Stip. ¶ 208][5] Its rentals and sales are performed by approximately fourteen employees on defendant's payroll. [Stip. ¶ 210] The case at bar concerns "persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant. . . ." [Stip. ¶ 2]

The Stipulation sets forth issues formulated from the pleadings. [Stip. ¶¶ 1-3] This Opinion will review these issues of law as tendered.

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[3] The following were also filed: "Plaintiff's Brief in Support of Summary Judgment"; "Defendants' Brief In Support of Summary Judgment", filed jointly by defendant and intervener; and Plaintiff's "Reply Brief in Support of Summary Judgment."

[4] Defendant maintains its principal office and place of business in the Grant Building, Pittsburgh, Pennsylvania. [Stip. ¶ 201]

[5] Defendant owns 50 of 2850 shares of a corporation which owns one of the buildings. [Stip. ¶ 206]

Issue

"Are the various persons employed in maintenance, custodial and operational activities at the buildings managed by the defendant 'employees' of the defendant within the meaning of the Act?" [Stip. ¶ 2]

Paragraph 303 of the Stipulation asserts:

"In the management and maintenance of the managed properties, Arnheim and Neely, Inc., at all times acting pursuant to their contracts with the building owners, engages in the following:

a) Arnheim and Neely, Inc. hires all labor and employees required for the operation and maintenance of the managed premises. The hiring and pay of the building superintendents are occasionally subject to approval of the building owners.

b) Arnheim and Neely, Inc. discharges all labor and employees required for the operation and maintenance of the managed premises.

c) Arnheim and Neely, Inc. supervises all labor and employees required for the operation and maintenance of the managed premises.

d) Arnheim and Neely, Inc. provides a managerial person (separate and apart from the building superintendent) in regard to most, if not all of the managed properties.

e) Arnheim and Neely, Inc. schedules the hours to be worked by all persons engaged at the managed properties.

f) Arnheim and Neely, Inc. determines the rates of pay of all employees engaged at the managed properties, subject to approval of building owners without exception. . . .

g) Arnheim and Neely, Inc. determines the method of payment of all persons engaged at the managed properties, subject to union agreement, if any.

h) Arnheim and Neely, Inc. establishes fringe benefits for all persons engaged at the managed properties, subject to owner's approval.

i) Arnheim and Neely, Inc. negotiates union contracts in regard to those persons engaged at the managed properties who are union members.

j) Arnheim and Neely, Inc. prepares the payroll for all persons engaged at the managed properties.

k) All persons engaged at the managed properties are paid by means of Arnheim and Neely, Inc. checks, drawn on the appropriate owner's account.

l) Persons on Arnheim and Neely, Inc's [sic] staff are assigned managerial responsibility for one or more of the particular buildings.

m) Arnheim and Neely, Inc., through its staff manager or through the building superintendent, assigns the persons engaged at the buildings to the various required duties and supervises the performance thereof.

n) Promotions or reductions in rank and increases or decreases in pay as to the persons engaged at the managed buildings are determined by Arnheim and Neely, Inc., subject to owner's approval.

o) Arnheim and Neely, Inc. makes legal deductions, including Income Tax, Social Security, etc., from the pay checks of all persons engaged at the managed buildings.

p) The 'Contract for Management' (Exhibit I [to the Stipulation]) provides, with respect to the managed buildings, 'that all employees shall be deemed the employees of the OWNER and not the AGENT.'"

Elsewhere in the Stipulation, it is asserted that "[e]ach building owner has separate employer's identification numbers for federal, state, and city payroll taxes." [Stip. ¶ 301(g)]

Section 6 of the Fair Labor Standards Act defines the following terms:

* * * *

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d).

"(e) 'Employee' includes any individual employed by an employer . . . ." 29 U.S.C. § 203(d).

In *Greenberg v. Arsenal Bldg. Corp.*, 50 F. Supp. 100 (S.D. N.Y. 1943), aff'd per curiam 144 F. 2d 292 (2 Cir. 1944), rev'd in part on other grounds sub nom *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296 (1945), where suit was brought against a building rental agent, both the District and the Circuit Court held the defendant to be an "employer" within the meaning of the Act.*

Viewed broadly, the relationship described in the Stipulation between defendant and the employees comports with the statutory standard of employer-employee. See *United States v. Silk*, 331 U.S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757 (1947). It remains only to review certain aspects peculiar to this relationship to determine whether or not they require a contrary determination.

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* *Greenberg* asserted liability on the ground that the rental agent was an "employer" "acting directly or indirectly in the interest of an employer in relation to an employee . . ." 50 F. Supp. 703; cf. *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2 Cir. 1960). As developed more fully, below, our analysis does not view defendant as simply "acting . . . in the interest of an employer."

In *Bartels v. Birmingham*, 332 U.S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A.L.R. 817 (1947), band leaders resisted liability to their musicians on the grounds, *inter alia*, that leaders' contracts with ballroom operators specified that the musicians were to be regarded as employees of the operators rather than of the leader. The agreements also required filing of various social security taxes by the operators. Notwithstanding these features, the Supreme Court, reversing the Circuit Court's judgment, held the leaders liable.

The sole remaining element to be considered is the reservation by the owners of a right to review certain of defendant's determinations regarding the management of its building. It may well be that these provisions vest the owners with certain control over the employees. However, the Act recognizes the concept of joint employments. *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F. 2d 105 (5 Cir. 1961); *Wirtz v. Hebert*, 368 F. 2d 139 (5 Cir. 1966); *Mid-Continent Pipe Line Co. v. Hargrave*, 129 F. 2d 885 (10 Cir. 1942). Although the proprietors of the individual buildings may perhaps be deemed employers, *Wirtz v. Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 201 (W.D. Tenn. 1965), this circumstance does not foreclose treating defendant as an employer within the meaning of the Act.

Defendant contends that Congress' adoption of the "enterprise" formula in 1961 requires a new test for determining the employer-employee relationship. We cannot agree. The Fair Labor Standards Amendment of 1961, Pub. L. 87-30, 75 Stat. 65 (U.S. Code Cong. & Adm. News 1961, p. 71 et seq.), merely re-

...ended]* the prior provision limiting coverage to employees "engaged in commerce or in the production of goods for commerce" and provided coverage to all employees in an "'enterprise' engaged in commerce or production for commerce." *Maryland v. Wirtz*, ... U.S. 183, 186, 188, 88 S. Ct. 2017, 20 L. Ed. 2d ... (1968). The 1961 amendments were unaccompanied by any modification in the definition of "employee", "employer" or "employment."** The decisional law reflects no change in the pre-1961 principles utilized for determining the employer-employee relationship.

Defendant relies on the statement in *Bartels v. Birmingham*, *supra*: ". . . In the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U.S. 130. It contends that the business to which they render service is the building rather than defendant.

The statement in Bartels must be interpreted in the light of the judicial history construing the term "employee." As described in *Illinois Tri-Seal Prod...*, Inc. v. *United States*, 353 F. 2d 216 (Ct. Cl. ...), in the years following the enactment of the ... in 1935, the Treasury Department and a majority of the courts held that the term was to be given its common-law meaning, which was grounded in the element of control. In 1947, the Supreme Court de-

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*The bracketed words were subsequently struck by the court and the words "changed the basis of" were substituted.

**The Fair Labor Standards Amendments of 1966, Pub. L. ...-601, 80 Stat. 830 (U.S. Code Cong. & Adm. News 1966, p. ... et seq.) likewise made no modifications in the statutory definitions.

cited *United States v. Silk*, supra, holding that a "constricted interpretation" of the term "employee" to exclude all who are independent contractors within common law concepts failed "to accomplish the purposes of the legislation." 331 U.S. 712.

Defendant seeks to utilize the "economic reality" doctrine to mitigate the indicia of its control of the employees. No warrant for this lies in the decisional law.

Defendant cites a section of the Senate Report No. 1487, 89th Cong., 2d Sess. (1966), on the 1966 Amendments to evidence a legislative intent to treat the employees in question as employees of the building owners:

> ". . . where a person other than the owner of an apartment building is engaged by the owner to perform management services in connection with the operation of the building, these individuals employed at and resident in the building as managers, caretakers, janitors, or in a similar capacity shall be considered for the purposes of this subsection employees of the building owner." 1966 U.S. Code Cong. & Adm. News, p. 3029.

Senate Report No. 1487 proposed the inclusion of equivalent language in an amended section 3(s). However, the Senate-House Conference Committee rejected the Senate's proposed amendment. 1966 Cong. Rec. 22661 (daily ed. Sept. 14, 1966). The Congressional treatment of the issue fortifies our conclusion that the relationship between building employees and management agents should be determined in accordance with the customary principles obtaining under the Act.

We conclude that the stipulated issue must be answered in the affirmative.

ISSUE

"In determining 'annual gross volume of sales made or business done' by the defendant within the meaning of Section 3(s) of the Act, are the gross rentals from the aforementioned management activities to be included or merely the commissions obtained by the defendant from such activities?" [Stip. ¶ 6]

According to the Stipulation, the annual gross rental income collected by defendant from the managed buildings exceeded $1,000,000 per annum. [Stip. ¶ 206] Defendant's commissions on these rentals approximated or exceeded $200,000 in 1964 and 1965, and $250,000 in 1966 and thereafter. [Stip. ¶ 207] Commissions have never exceeded $500,000 per annum. [Ibid]

The Fair Labor Standards Amendments of 1961, *supra*, established as one condition to "enterprise" coverage an "annual gross volume of sales of such enterprise . . . not less than $1,000,000." 29 U.S.C. § 203(s)(3) (1958 Ed. Supp. V). The Fair Labor Standards Amendments of 1966, *supra*, require for the period February 1, 1967, through January 31, 1969, a minimum "annual gross volume of sales" of $500,000 and thereafter of $250,000. 29 U.S.C. § 203 (s)(1) (1964 Ed. Supp. II).

Defendant contends that only its commissions of rentals should be included in determining its "annual gross volume of sales." In this instance, the statutory requirement for coverage would not have been satisfied until February 1, 1969. The Government

argues that the computation of defendant's "annual gross volume of sales" requires inclusion of all rentals collected by defendant.

The Senate Report on the 1961 Amendments expressed the underlying philosophy of the provision and asserted:

> "... The million dollar test is an economic test. It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law." S. Rep., No. 145, 87th Cong., 1st Sess., U.S. Code Cong. & Adm. News 1961, p. 1624. Quoted in *Wirtz v. Southeast Bank & Trust Co. of Sarasota*, 362 F. 2d 357, 362 (5 Cir. 1966); *Wirtz v. Columbian Mutual Life Ins. Co.*, *supra*, 246 F. Supp. 202; *Wirtz v. First National Bank and Trust Co.*, 365 F. 2d 641, 645n (10 Cir. 1966).

Defendant relies on two District Court opinions *Schmidt v. Randall*, 160 F. Supp. 228 (D. Minn. 1958), and *Mitchell v. Carratt*, 160 F. Supp. 261 (S.D. Fla. 1956), wherein the plaintiffs' attempt to include the gross receipts of the defendants' sale of bus tickets were rejected in favor of computing only the defendants' commissions on the sales.

On the other hand, in *Wirtz v. Jernigan*, 405 F. 2d 155 (5 Cir. 1968), at issue was the computation of the defendant's sale of bus tickets as an agent of Greyhound Corporation. Including the gross receipts rather than the defendant's commissions, the Court speaking through Judge McEntee of the First Circuit, asserted:

". . . The district court reasons that defendant is not merely including his profit since he has to pay certain expenses out of the commissions. This is strictly true but nothing follows from it. It is equally true that the restaurant proceeds over and above the price of the food must be further reduced by overhead such as rent and salaries. But if the fact that the commissions do not represent pure profit leads to the conclusion that only the commissions should be considered in determining qualification for the exemption, then the cost of food in the restaurant should also be excluded on the same basis. Yet no one suggests this conclusion for the fundamental reason that proceeds and profits are not the same thing." 405 F. 2d 159.

In *Wirtz* v. *First National Bank and Trust Co.*, *supra*, the landlord's wholly-owned subsidiary received a "management fee" of $30,000 per annum on gross earnings from rentals of over $2,000,000. The Court of Appeals for the Tenth Circuit computed the gross rentals in determining the subsidiary's gross volume of sales." 365 F. 2d 644, 645. Cf. *Wirtz* v. *Columbian Mutual Insurance Co.*, *supra*.

We believe the *Jernigan* case *supra*, represents the better view and the correct application of the Congressional intent. Accordingly, we conclude that gross rentals from defendant's management activities must be included in determining its "annual gross volume of sales made or business done."

Issue V

"Are the business activities of [defendant] . . . particularly those related to the manage-

ment of various buildings, related activities performed through unified operation or common control for a common business purpose so as to constitute an enterprise within the meaning of Section 3(r) of the [illegible] Act . . . ." [Stip. ¶ 1]

Section 3(r), as added to the Act by the 1961 Amendments, *supra*, defined as follows:

"'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . ." 29 U.S.C. § 203(r) (1968 Ed. Supp. V).

The statutory defintion of enterprise requires the existance of three elements: (1) related activities, (2) unified operation or common control, and (3) a common business purpose. *Wirtz* v. *Savannah Bank & Trust Co. of Savannah*, *supra*, 362 F. 2d 859. As stated in the Regulations:

". . . the answer to the question whether particular activities are 'related' or not, will depend in each case upon whether the activities serve the business purpose of the enterprise, or whether they serve a separate and unrelated business." 29 C.F.R. § 779.206(b).

Defendant's relevant business includes the management of buildings. [Stip. ¶ 204] Its "Contract for Management" mandates it "[t]o hire, discharge and supervise all labor and employees required for the operation and maintenance of the premises. . . ." [Stip. Exh. 1, p. 2] The activities of such laborers are related to defendant's business.

Paragraph 303 of the Stipulation, quoted *supra* at page 8 et seq. establishes defendant's "common control." Cf. 29 C.F.R. § 779.221. Likewise, the activities of the employees in each building serve a "common business purpose." Cf. 29 C.F.R. § 779.213. Defendant challenges treating the various buildings as "establishments" of defendant. It argues:

"[Plaintiff] has ignored the absolute necessity of establishing each of these various buildings as 'establishments' of the 'enterprise' of [defendant]. Nothing in the Stipulation or in the facts suggest [sic] that [defendant] maintains a distinct place of business anywhere else except at the Grant Building." [Defendant's Brief, p. 10]

The Act does not define the term "establishment." However, the term has been judicially construed to mean "a distinct physical place of business." *Phillips Co. v. Walling*, 324 U.S. 490, 496, 65 S. Ct. 807, 89 L. Ed. 1095, 157 A.L.R. 876 (1945). Accord: 29 C.F.R. § 779.23. This construction was not modified by more recent amendments to the Act. *Wirtz v. Savannah Bank and Trust Co. of Savannah*, *supra*, 362 F. 2d 863.

By its contract with the various buildings, defendant is in the "business" of managing the buildings' janitorial services. Necessarily these must be per-

formed in the buildings. Therefore, each building becomes one of defendant's "places of business."

Defendant argues:

> "... if the buildings themselves are to be considered part of [defendant's] 'enterprise', then how can the government avoid including the building owners as part of that enterprise? But to try to do so would have been ludicrous, for it is apparent ... that these various owners of the buildings are not acting together with each other and [defendant] for a 'common business purpose'. It is even possible that one owner does not know which other buildings [defendant] are [sic] managing for others." [Defendant's Brief, p. 10]

The flaw in this analysis is the correlation of "enterprise" to "buildings", whereas the statutory definition defines "enterprise" as "related activities." 29 U.S.C. § 203(r) (1958 Ed. Supp. V). Moreover, as the Regulations assert: "... the term 'enterprise' is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide." 29 C.F.R. § 779.203(b).

We are confronted here with a situation analogous to the case of a chain's store in a supermarket. Treating the entire supermarket as the owner's "establishment" does not preclude treating the particular store as one of the chain's "establishments" and the activities conducted in that "establishment" as part of the chain's "enterprise." Cf. 29 C.F.R. § 779.225.

Issue

"Among the persons ... employed at the various buildings managed by the defendant, are

there at least two persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act?" [Stip. ¶ 4]

The Stipulation refers to the activities of various employees in each building. [Stip. ¶ 501] These activities may be categorized as follows: 1) operating elevators carrying mailmen delivering mail and parcel post and carrying delivery men making deliveries, a "portion" of which originate outside Pennsylvania; 2) operating elevators carrying freight to and from the building, a "portion" of which involved interstate shipments; and 3) using in connection with maintenance work "goods . . . including such goods as soap, detergent, waxes, and light bulbs," originating outside Pennsylvania. [Stip. ¶¶ 501, 502]

In determining the coverage of elevator operators in office buildings, absent evidence that tenants are themselves engaged in producing goods for interstate commerce, the mere fact that elevator operators convey mailmen and deliverymen carrying items in interstate commerce does not suffice to bring the elevator operators within the coverage of the Act. *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806, 161 A.L.R. 1263 (1945).[1]

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[1] Plaintiff relies on *Wirtz* v. *Columbian Mutual Life Ins.* *supra*, as authority for treating the employees in the case at bar as engaged in interstate commerce. In the *Columbian* case, the Secretary sought coverage for elevator operators and building porters. The Court sustained coverage of

With reference to the janitors' use of "soap, detergent, waxes, and light bulbs" which have moved in interstate commerce, two features are important:

1) The term "goods," as defined in Section 3(i) of the Act, ". . . does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof, other than a producer, manufacturer, or processor thereof." 29 U.S.C. § 203(i).

2) As stated in 29 C.F.R. § 779.240(a):

"... the mere fact that employees ... are using machinery, equipment, work tools, and the like, which may have been moved in or produced for commerce, does not mean that they are handling, selling, or otherwise working on 'goods' that have been moved in or produced for commerce within the meaning of Section 3(s)."

We conclude that there have not been two employees in each building engaging in interstate commerce.

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these employees under the "enterprise" doctrine on the basis of the porters' activities, described as follows:

"... The building does not have a freight elevator so that freight and express shipments are lowered into the basement during the day by a sidewalk lift operated by porters, signed for by them, and then at night these shipments are carried by porters, on the passenger elevators, to the offices of the tenants. A substantial part of these shipments have moved in interstate commerce." 246 F. Supp. 208.

In the case at bar, only employees at the Buhl Building "personally" handle the delivery of parcels. [Stip. ¶ 501] Elsewhere, they merely operate elevators carrying deliverymen. [*Id.*] Moreover, the Stipulation does not establish that a "substantial part" of these parcels had originated outside Pennsylvania. The *Columbian* case is inapposite.

Issue

"Prior to February 1, 1967, was defendant's business an enterprise as defined in Sections 3(r) and 3(s)(3) of the Act as it then read?" [Stip. ¶ 7]

We have heretofore concluded that the activities of the employees in question constituted part of the "enterprise" of defendant within the meaning of Section 3(r). Section 3(s), as supplied by the 1961 Amendments, *supra*, provided:

> "'Enterprise engaged in commerce or in the production of goods for commerce' means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:
>
> * * * *
>
> "(3) any establishment of any such enterprise . . . which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000." 29 U.S.C. § 203(s) (1958 Ed. Supp. V).

We have heretofore concluded that the "annual gross volume of sales" of defendant's enterprise requires a computation of the gross rental receipts for the various buildings. However, we have also heretofore concluded that at none of the buildings did defendant have two or more "employees engaged in commerce or in the production of goods for com-

merce." None of the employees were covered under the 1961 Amendments to the Act.

ISSUE

"Does [defendant] employ anywhere two or more persons performing activities which constitute engagement in interstate commerce or in the production of goods for commerce, within the meaning of the Act, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce?" [Stip. ¶ 5]

The Stipulation asserts:

". . . a number of [defendant's] employees employed in its home office were regularly and recurringly engaged in preparing and handling correspondence, remittances, billings, advertising materials, and other miscellaneous goods, including profit and loss statements, governmental reports, and real estate leases, a portion of which were transmitted to points outside the Commonwealth of Pennsylvania, and regularly and recurringly using channels and facilities of interstate communication such as telephones, telegraph, and United States mail in corresponding and communicating with persons and concerns located outside the Commonwealth of Pennsylvania." [Stip. ¶ 211]

Section 3(b) of the Act defines "commerce" to include ". . . communication among the several States or between any State and any other place outside thereof." 29 U.S.C. § 203(b). Employees engaged in these activities are engaged in interstate commerce. *Mitchell* v. *Joyce Agency, Inc.*, 348 U.S. 945, 75 S.

99 L. Ed. 740 (1955), rev'g 211 F. 2d 241 (7 Cir. 1954), rev'g in part 110 F. Supp. 918 (N.D. Ill. 1953); *Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (8 Cir. 1957).

We conclude that defendant employs two or more persons performing activities which constitute engagement in interstate commerce.

ISSUE

"After February 1, 1967, was defendant's business an enterprise as defined in Section 3(r) and 3(s)(1) of the Act as amended?" [Stip. ¶ 8]

We have heretofore determined that defendant's operations constituted an ["establishment"] within the meaning of Section 3(r) of the Act, as amended in 1961. The 1966 Amendments, *supra*, note 6, made no relevant alteration in the language of Section 3(r). Therefore, defendant's relevant activities have also constituted an "enterprise" since February 1, 1967.

The 1966 Amendments, *supra*, adopted a new Section 3(s), which provides:

"'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales

made or business done is not less than $500,000 and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 . . ." 29 U.S.C. § 203(s) (1965 Ed. Supp. II).

It is not disputed that defendant's enterprise "has employees engaged in commerce." Based on a prior conclusion, it is likewise clear that defendant's "annual gross volume of sales made or business done" exceeds the statutory minimums.

We conclude that after February 1, 1967, defendant's business constituted an "enterprise" within the meaning of the Act.

Issue

"If there is liability under the Act to any of the employees of any of the buildings managed but not owned by [defendant], is it the liability of the defendant or is it the liability of the owner of the buildings?" [Stip. ¶ 3]

Section 6 of the Act imposes liability for payment of the minimum wage and overtime pay on the "employer." 29 U.S.C. §§ 206, 207. We have heretofore noted that defendant is the "employer" within the meaning of the Act; and thus its liability is clear. None of the building owners are parties to this action. Accordingly, any observation we might make regarding their own potential liability would not be dispositive of an issue not properly within the ambit of the

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* The bracketed words was subsequently struck by the court and the word "enterprise" was substituted.

action. Cf. *Arnstein v. 149 Madison Ave. Corp.*, Supp. 385 (S.D. N.Y. 1945), aff'd 156 F. 2d (2 Cir. 1946), aff'd 331 U.S. 199, 67 S. Ct. 1178, Ed. 1432, 169 A.L.R. 1293 (1947), modified her grounds 331 U.S. 795, 67 S. Ct. 1726, 91 L. 1922 (1947).

ORDER OF COURT

AND NOW, to-wit, this 30 day of September, 1938, it is hereby ORDERED and DIRECTED that counsel for the plaintiff submit, after notice to counsel for the defendant and for the intervener, within twenty (20) days, a proposed form of order for final judgment in accordance with the foregoing Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER AMENDING OPINION

Now, to-wit, this 6 day of October, 1969, the Opinion filed herein on September 29, 1969, is hereby amended by striking the words "merely repealed" as they appear in the third sentence of the third paragraph on page six, and substituting therefor the words "changed the basis of".

The Opinion is also amended by substituting the word "enterprise" for the word "establishment" in the first sentence of the first paragraph on page fifteen of the said Opinion.

JOHN L. MILLER
United States District Judge

[Caption Omitted]

ORDER

This cause was heard on motion of the plaintiff for summary judgment and on cross motions of the defendant Arabeins and Neely, Inc., and defendant intervenor The Institute of Real Estate Management of the National Association of Real Estate Boards for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court, having considered the pleadings herein and the comprehensive stipulations of facts of the parties, and having heard the argument of counsel, and after due deliberation a written opinion having been duly entered, it is

ORDERED that defendant and defendant intervenor's cross motion for summary judgment be and hereby is gratned with respect to wage payments made prior to February 1, 1967 in conformity with the opinion of this Court entered herein, and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be and hereby is granted with respect to wage payments made after February 1, 1967 in conformity with the opinion of the Court entered herein, that the defendant constitutes an enterprise engaged in commerce and/or in the production of goods for commerce within the meaning of Section 3(s)(1) under the 1966 amendments to the Fair Labor Standards Act (80 Stat. 830), and hot within the meaning of Section 3(s)(3) under the 1961 amendments to the Fair Labor Standards Act (75 Stat. 65), and it is

FURTHER ORDERED that, in the exercise of the Court's discretion, no injunction will be entered regarding future violations of the Act.

December 17, 1969.

JOHN L. MILLER
United States District Judge

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